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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1198

RELIANCE INSURANCE COMPANY, *Petitioner*

v.

BLOUNT BROTHERS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Reliance Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, *infra*, pp. 1a-19a), is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1967. Upon motion by petitioner the mandate has been stayed until March 27, 1967, or until such time as action is taken upon this petition. Jurisdiction is based on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the appellate Court err in rejecting the main basis on which the appeal was taken, for the purpose of weighing the facts as disclosed by the entire record, and thereafter substituting its factual opinions for those of the Jury; and if so did such action violate the provisions of Rule 50(a) and (b), Federal Rules of Civil Procedure, as well as the Seventh Amendment of the Constitution.

STATUTES INVOLVED

Rule 50(a) and (b) of the Civil Rules of Procedure in Federal Courts; Article Seven of the Constitution of the United States. (Appendix "B", *infra,* pp. 19a-20a)

STATEMENT

Involved here is a subcontract for the performance of certain painting work under a prime contract covering the construction for the United States of a nuclear reactor located in Montgomery County, Maryland. The prime contract, dated April 25, 1963, was to be performed by Blount Brothers Corporation of Montgomery, Alabama; and the subcontract, dated August 2, 1963 was to be performed by William Dunbar Company, Inc., of Brentwood, Maryland, and was in the amount of $90,000.00.

Standard Accident Insurance Company (now Reliance Insurance Company, hereinafter referred to as "Reliance") wrote a bond covering performance of the contract naming Blount Brothers Corporation ("Blount") as obligee, and William Dunbar Co., Inc., ("Dunbar") as principal.

After a substantial amount of the painting work had been performed, but prior to completion of all the work; Blount declared Dunbar in default, and terminated the painting subcontract. This was in a letter dated November 23, 1964, and on the same date a similar letter was directed to Reliance demanding that it immediately take over completion of the subcontract work. In fact a response was demanded within 48 hours. (R. 113-114) Four days later, on November 27, suit was instituted by Blount in the United States District Court for the Middle District of Alabama, Northern Division, by filing a Complaint with the Clerk in Montgomery, Alabama, with a demand for a jury trial. (R-1) The completion date for the prime contract when these events occurred was April 1, 1965. (R. 115)

There followed a motion for a change of venue to the United States District Court for Maryland filed by defendant Reliance on January 21, 1965 (R. 15), which was opposed by Blount, and which was denied on February 1, 1965. (R. 26) Thereafter a motion for a stay and dismissal of the Complaint was filed by Reliance on April 21, 1965, on the ground the subcontract required arbitration of the dispute, but this motion was opposed by Blount, and was denied by the Court orally on April 21st, and later formally on April 23, 1965, the trial having commenced on April 22, 1965. (R. 36)

The trial lasted four full days, comprises 804 pages of testimony 102 exhibits, at the conclusion of which

both sides moved for a directed verdict, which was taken under advisement. (R. 935-937) Thereafter, Reliance submitted proposed instructions for the jury, but none were submitted by Blount. (R. 937-938) Subsequent to the Court's charge to the jury Reliance excepted to the extent its proposed instructions were not included in the charge, but no exceptions were taken by Blount. (R. 969-970) On April 27, 1965, the jury found for Reliance in the following terms: "We the jury find the issues in favor of the defendant." (R. 977)

On May 5, 1965, Blount filed a motion for judgment notwithstanding the verdict and for a new trial, both of which were denied on June 11, 1965. (R. 981-985) Blount filed its Notice of Appeal on June 18, 1965 (R. 986), the case was argued on November 4, 1966, and on January 11, 1967, the Court of Appeals entered its judgment reversing the judgment of the District Court denying Blount's motion for judgment, *non obstante verdicto,* and remanding the case for a "determination of the amount of damages resulting from the breaches of the subcontract for which the appellee bonding company made itself liable."

REASONS FOR GRANTING THE WRIT

Blount presented its appeal on the sole ground that because of what it termed judicial admissions of counsel for Reliance, as well as what it described as admissions by its principal witness, there was an admitted breach of contract by Reliance, leaving nothing for the Jury to decide. The main question presented to the appellate Court by the appellant was, whether a compensated surety's bond conditioned on faithful performance of terms and conditions of a construction

subcontract is broken by the admitted failure of principal to perform its contract. The appeal was met on this ground by Reliance; and both in its brief, and in its oral argument, it sought to show that there was no such admission.

The Court below refused to accept the appeal on this ground, saying there were no such admissions, and that the argument of Blount was too glib; the Court also said that the argument of Reliance was too bland, thus making it necessary for the Court to read the entire transcript of testimony (988 pages), and the more than 100 documentary exhibits, to see whether there was any evidence on which the jury could have based its verdict. (App., pp. 2a-3a) In its opinion the Court below then proceeded to discuss all the evidence of record, at great length, and reached the conclusion the verdict of the jury should be set aside. The Court did not decide to set aside the verdict because there was no evidence to support it (the usual test) but because, in its opinion, after weighing all the testimony and exhibits, "there was no evidence to warrant submission of the excuses for non-performance to the jury, because none of this evidence was sufficient as a defense to the requirements of the general terms of the contract and the specific terms of the subcontract." (App., p. 18a)

II

The basic error of the lower Court lies in the fact that it was unwilling to accept either the verdict of the jury, or the legal theory of Blount, but instead felt free to study the entire record for the purpose of making its own factual findings, and for the purpose of spelling out its own legal theory of the case.

Blount appealed on the sole ground that as a result of admissions by Reliance and its counsel, there were no disputed issues to go to the Jury. The Court below finds that there are no such admissions. It then proceeds to discuss the entire record, at length, and decides, according to what it regarded as the crucial legal issues in the case, not that there was no evidence to support the verdict of the Jury, but that there was no evidence to warrant submission of the excuses for nonperformance to the Jury. It is suggested that this is a clear-cut violation of Rules 50(a) and (b) of the Federal Rules of Civil Procedure, as well as the provisions of the Seventh Amendment to the Constitution.

This petition is not the proper place to comb through the opinion of the lower Court to show that many of its factual conclusions are not supported by a preponderance of the evidence of record, as they should be, since the action of the Court is in effect a ruling for the plaintiff, nor to show that the lower Court did not understand where Reliance placed its emphasis in presenting its case to the District Court, and to the Jury.

It is pertinent to show, however, that the decision on its face reveals that there were issues of fact that the jury was entitled to decide. For example, one of the main arguments of Reliance was that the concrete surfaces, for which Blount was responsible, were never at any time in a condition that would enable Dunbar to proceed with the painting. Ample evidence was submitted in support of this point (App., p. 7a; R. 584-844; 884-893). Moreover, the argument was never entirely rejected by the Court. Rather it was said that any failures by Blount on this score were either unimportant, or had been overcome by a new method of ap-

plication suggested by a new paint manufacturer located by Dunbar prior to termination. (App., p. 18a)

There are many other indications of a weighing of the evidence on the part of the Court. In discussing whether Dunbar offered any evidence justifying its alleged failure to perform some other items mentioned in the contract, the Court states, "There is some dispute * * *," about how Dunbar submitted certain paint samples, "but we think this unimportant." (App., p. 10a) Another indication of the weighing of the factual issues, appearing on the face of the decision, is the statement that "Dunbar's defense is, rather, that its compliance was excused either because the surfaces were not ready for its work, or that final compliance was required in too short a time." (App., p. 12a)

The discussion contained in the decision shows that beyond question the Court below was weighing the evidence to decide whether in its opinion the Jury was right or wrong, and the decision, on its face, shows further that in this instance the Court was acting in excess of the authority it has for this particular purpose.

III

The decisions dealing with Rule 50(b) have established the doctrine that the verdict of a jury should be treated with the utmost caution, and should be set aside only in most extreme cases. Indeed, in one case this Court said that in view of the Seventh Amendment to the Constitution guaranteeing a jury trial in suits at common law, the trial court had no power to set aside a verdict. *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364, 57 L. Ed. 879. This view was later modified in *Baltimore and Carolina Line* v. *Redman,* 295 U.S. 654,

79 L. Ed. 1636; and the terms of the latter decision have now been incorporated into Rule 50 of the Civil Rules of Procedure in Federal Courts.

The doctrine that has been developed is well-stated by this Court in *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U.S. 29, 34, 88 L. Ed. 520, 525: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Or as was said by the Court of Appeals for the Fifth Circuit in *Marsh* v. *Illinois Central R. Co.*, 175 F. (2) 498, 500, Cir. 5,

> "While it is not our function to weigh the evidence, we do agree with the trial judge's first expressed opinion that the weight of the evidence is 'overwhelmingly against the plaintiff.' But we do not agree that the grant of a judgment notwithstanding the verdict was therefore justified. There was evidence of the appellant, not very explicit or positive, which if believed might authorize a jury to conclude he was hurt in the manner he claims. Because the trial judge does not believe it, because of appellant's own contradictions and conduct and of opposing evidence which seems to overwhelm it, is not ground for a judgment notwithstanding the verdict, and we must reverse that judgment." *Howard* v. *Louisiana & A. R. Co.*, 5 Cir., 49 F. (2) 571.

In its decision in this case the Court below acknowledges the existence of the foregoing doctrine (App., p. 12a), but the decision does not give it effect.

Indeed, there are indications in the decision that although the Court was aware of the rule applicable to motions NOV, it was not prepared to observe its re-

strictive effect in this particular instance. There is at least one indication on the face of the decision that the Court felt it was within its power to exercise a certain degree of discretion in weighing the evidence. It is said at one point that, "There can be no serious dispute between the parties as to the standard by which an appellate Court must review the refusal of a trial court to grant a motion for a judgment notwithstanding a verdict by a trial jury, or the denial by a trial court of a motion for a new trial." (App., p. 12a) The decision then proceeds to discuss precedents relating only to motions for a directed verdict, as if the tests were the same. The test applied by a Judge in granting a new trial is not the same as applied to a motion NOV. The new trial motion invokes a considerable amount of discretion on the part of the trial court; the motion NOV does not. If the Court below was under the impression that the same test applies to both, this may explain its willingness to weigh all the evidence, the entire record, as it seems to have done in passing upon the correctness of the jury verdict.

IV.

In many respects the decision indicates the Court did not understand the theory of the Reliance case; and that it was in error in the way it applied certain legal principles, aside from those directly bearing on the motion NOV.

(a) It has chosen to characterize the presentation of Reliance as one in confession and avoidance, a term taken from the common law. (App., pp. 13a-14a) Later it is said,

> "Appellee defends largely upon the concept that its bonded contractor had undertaken a very diffi-

> cult subcontract which it was attempting, to the best of its ability, to carry out at the time of termination. A second defense is that at the time of termination others were at fault for the failure of Dunbar and Company to satisfy the requirements imposed on it by the subcontract."

Reliance did not plead, in effect, confession and avoidance. And it did not vaguely state "others" were at fault. (R. 584-844) It argued throughout the case that Blount was directly responsible for any non-performance on the part of Dunbar, not "others," and that this being so Dunbar was directly prevented from performing by the opposite party to the case. Blount prevented performance by failing to deliver adequate concrete surfaces, and, by failing to promptly submit the Dunbar paint samples to the Government. (R. 656) Since Dunbar had no privity with the United States, it could not do so itself. This does not constitute a confession and avoidance situation. Rather it is one where the performance by one was prevented by the interference of the other party to the contract.

(b) It will also be noted that the Court rejects the Reliance argument about the faulty paint design of the Government, on legal grounds, saying such a faulty design avails Reliance nothing in this proceeding. But the lower Court is wrong about this, since Dunbar is bound under its subcontract only to the extent that Blount is bound to the Government. And it is well-settled that if the design here was wrong, if it had to be changed to permit its use, as was the case here, Blount was free to disregard the original specifications, if it saw fit. Dunbar as the subcontractor would have the same right, if it had cared to exercise it, which it did not. *United States* v. *Spearin*, 248 U.S. 132, 63 L. Ed. 166.

(c) The Court also places great stress throughout the decision on the fact that subsequent to the termination date of November 23, 1967, Dunbar made a further effort to avert the termination by appearing at the job site ready for work. (App., p. 16a) What Dunbar may have done or not have done subsequent to the termination can have no relevance. The sole question for the Jury was whether the termination was justified when it occurred.

V

Blount issued what the Court below has termed an ultimatum, (App., p. 8a), on ten days notice. The terms of the ultimatum are contained in footnotes to the decision (App., pp. 8a-10a); and even a casual reading will convince that it would be impossiple to meet its terms within a ten-day period.

This makes it necessary to consider what preceded the ultimatum. Was Blount justified in issuing the ultimatum when it did, or did it, by its own previous actions, create the situation, or contribute to the situation, as it existed when the ultimatum was rendered.

It is suggested that the evidence shows, Blount was largely responsible for Dunbar's difficulties (1) because it did not provide concrete surfaces that could be painted and (2) because by failing promptly to submit paint samples to the Government, and otherwise to adequately represent Dunbar's interests with the Government, with whom Dunbar was not in privity, it became impractical for Dunbar to make the progress he desired. These are just some of the reasons shown by the evidence. (R. 584-844).

Under these circumstances and having been responsible for things as they existed, or having substantially

contributed to the difficulties, Blount had no legal right to suddenly issue an ultimatum providing ten-days notice prior to termination. At least the jury was entitled to reach such a conclusion.

When the Court below decided to minimize all of the record preceding the issuance of the ultimatum, as the discussion in the decision seems to do, it fell into serious error.

The entire attention of the Court below focuses on the terms of the ultimatum, and what Dunbar did to comply with its terms. Not much weight is given by the Court to the way in which Dunbar's efforts were thwarted by Blount; or indeed, whether Blount was entitled to make many of the demands contained in the ultimatum by the express or implied terms of the subcontract and the specifications. This was reversible error.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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March 27, 1967.

APPENDIX

APPENDIX "A"

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23001

BLOUNT BROTHERS CORPORATION, *Appellant*,

v.

RELIANCE INSURANCE COMPANY, *Appellee*.

Appeal from the United States District Court for the Middle District of Alabama.

(January 11, 1967.)

Before TUTTLE, Chief Judge, THORNBERRY and GOLDBERG, Circuit Judges.

TUTTLE, Chief Judge: By this appeal, the appellant attacks the failure of the trial court to direct a verdict in its favor, and, in the alternative, the trial court's failure to grant a judgment notwithstanding the verdict, after a jury had found in favor of the appellee. F.R. Civ. P., Rule 50(a) and (b).

There is no dispute as to the background facts leading up to the lawsuit. Appellant further contends that there was no disputed issue that could properly be presented to the jury as to its theory of the case. This is that appellee Insurance Company's principal, the William Dunbar Co., Inc., a painting contractor under contract with appellant, the general contractor, on a nuclear reactor facility being built for the United States Government in Mont-

gomery County, Maryland, had failed to perform certain essential obligations of this contract which warranted termination of the contract by Blount and made the principal, and thus its surety, liable for the damages resulting from such termination.

On April 25, 1963, appellant Blount Brothers Corporation entered into a contract with the United States of America, acting through the General Services Administration, for the construction of a nuclear reactor facility in Montgomery County, Maryland. This facility consisted of a nuclear reactor, located in a concrete containment building, and a supporting laboratory and office wing. On August 2, 1963, Blount entered into a subcontract with the William Dunbar Company, Inc., by the terms of which Dunbar agreed to perform certain portions of the prime contract, specifically, the application of special coatings in the nuclear reactor building and the painting in the laboratory and administrative buildings. The Standard Accident Insurance Company was surety on Dunbar's bond. Standard was later merged with Reliance Insurance Company, which assumed all of the other company's obligations. By November 23, 1964, Blount, purporting to act pursuant to the authority of Art. XIII(a), of the general terms of the contract, notified Dunbar of a termination of the subcontract. Thereupon, Blount found another subcontractor who was engaged to complete the work (a substantial part) not already finished by Dunbar, and filed this suit against the bonding company to recover damages by reason of the fact that the subsequent contract cost substantially more than the unpaid balance due on the original subcontract with Dunbar.

The appellant's brief seeks too glibly to pitch the appellant's case on what it contends to be judicial admissions by appellee's counsel that the condition of the bond had been breached; that Mr. James Dunbar, president of the bonding company's principal, had admitted in open court

on the trial of the case, that conditions of the bond had been broken; and then, in attempting to assert that there were no substantial issues of fact to be passed on by the jury, appellant in its brief, did not outline the testimony most strongly in favor of its opponent, which, of course, is the approach that must be taken to the evidence by one challenging the right of the court to submit the case to the jury for its consideration. The appellee, on the other hand, too blandly asserts that the trial court did not err in refusing to take the case from the jury, because the jury has decided all these questions. The brief says, "A reargument of these questions before this court would not be justified unless the court wishes to consider the case de novo, which it can hardly afford to do."

As might be expected from the fact that the work related to rooms to be used in connection with the housing of a nuclear reactor, the wall, floor and ceiling coverings, the subject of this contract, were of unusual (called by some "sophisticated") coverings, quite different from ordinary interior house paint. Nevertheless, we must view the case in light of the fact that GSA desired to have this building completed exactly as prescribed in the specifications; Blount Brothers Company undertook to complete it in accordance with the same specifications; and Dunbar assumed the obligation to perform those parts of the job as fell within its contract to furnish the coverings. Of course, as required by the statute, the contractor and all of the subcontractors, including Dunbar, gave a performance bond to guarantee "all the undertakings, covenants, terms, conditions, and agreements . . ." of their respective contracts.

The state of the briefs, referred to above, has made it necessary for us to read the entire transcript of the evidence and to study the more than one hundred documentary exhibits introduced on the trial in order to test the appellant's contention that through counsel's admission during

the trial that Dunbar had not literally complied with each of the requirements of the subcontract, and in light of Mr. James Dunbar's testimony to the same effect, there was no substantial evidence of any fact which, if accepted as true, would legally excuse non-compliance with the written terms of the contract.

The historical facts relating to the status of the affair at the time of the letter of termination dated November 23, 1964, can be fairly simply stated. The subcontract required something unusual in the way of performance. It went much further than requiring that Dunbar cover the walls with a certain specified quality of wall coverings. It required, among other things, that, as to some of the work, the material to be used would have to be approved before application and it required, further, that Dunbar be approved by the manufacturer of the material as a qualified applicator, and that Dunbar also be approved by the GSA, as an approved applicator.[1] These requirements applied

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[1] Section 43 of the Specifications, 43-19. Polyester Resin Coatings.

a. Coatings shall be furnished and applied as specified.

b. Before polyester resin coatings are delivered or applied, the Contractor shall submit for approval by the Contracting Officer, the following:

Experience record of the applicator in applying polyester resin coating. The applicator's experience record shall include a minimum of one year's experience in applying polyester resin coatings.

A certified statement in triplicate by the manufacturer of the coating material stating that the experience record of the applicator is acceptable to the manufacturer. The statement shall include the name and address of the manufacturer.

Three copies of specifications, descriptive data, and catalogs of the coating system proposed.

Three sample coupons for each type of surface to be coated. The samples shall be approximately 6 inches by 6 inches, applied to the same type of surface as those to be coated in the work (metal samples for metal surfaces, concrete masonry unit samples, and samples on asbestos-cement board for concrete surfaces.

to four of the thirteen types of materials that were to be used in satisfaction of the painting and covering subcontract. The types were numbered 1 to 13, but the materials required under categories 1 through 9 were promptly approved. The difficulty arose from the ultimate failure, by Dunbar, at the time of termination, to commence applying item 10 and to obtain approval of the unusual, but somewhat less sophisticated materials required for items 11, 12 and 13, and the approval of the particular materials to be used to satisfy these requirements.

Type 10, as required by the specifications, is an elastomeric decontaminable coating for the interior surfaces of the exterior walls of the reactor area. It required several pages of the specifications adequately to set forth the specifications for type 10. It required 4 other pages to specify the items which Dunbar was required to submit to the government in connection with obtaining approval of a proposed manufacturer of special coating type 10.

Types 11, 12 and 13 are non-elastomeric decontaminable coatings intended for ceilings, walls and metal surfaces in the reactor area. It required four pages of the specifications to set forth the requirements as to these types, and six additional pages to specify the items which Dunbar was required to submit to the government in connection with obtaining approval of a proposed manufacturer of special coatings of types 11, 12 and 13. In the later discussion we are dealing only with types 10 through 13.

On February 14, 1964, six months after the contract was signed, Blount wrote to Dunbar requesting strict compliance with these specifications. By a letter of June 6, 1964, General Services Administration criticised Blount for the delay and Blount in turn called this to the attention of Dunbar. In the meantime, Dunbar was submitting samples, together with some of the required supporting data in an effort to meet the specification requirements as to these four types. On June 24, 1964, the General Services Ad-

ministration reported to Blount and Blount reported to Dunbar with reference to type 10: "Elastomeric coating, Type 10 finish . . . Disapproved in that when individual strips of each were subjected to a flame, they ignited and were not self-extinguishing after strips were removed from the flame." Further examination of elastomeric coating and system was discontinued. In the same letter, type 11 finish was disapproved, type 12 finish was disapproved and type 13 finish was disapproved. The letter then stated:

> "All coating samples were manufactured by the Vortex Manufacturing Company of Cleveland, Ohio. . . .
>
> "Other samples for the elastomeric and decontaminable coatings, types 10, 11, 12 and 13 finishes, shall be resubmitted from another manufacturer and source; resubmission shall include all required wet and dry samples, experience record of the applicator, certified statement from the manufacturer of the coating material stating the material experience record of the applicator, certified test data describing the material properties of the components of the proposed coating system, et cetera."

Dunbar was a franchise holder for Vortex products in the area in which this construction took place. The evidence reflects without dispute that the Vortex company was upset and disappointed with the rejection of its products 11, 12 and 13, and insisted upon a resubmission of its products in an effort to have them reconsidered. Notwithstanding the definite injunction, quoted above, that other samples, "shall be resubmitted from another manufacturer and source," no acceptable samples were resubmitted from any other manufacturer or source prior to the termination. Dunbar did, however, resubmit liquid samples of the Vortex types 11, 12 and 13, together with at least partial

supporting data as called for. These coatings were not approved by GSA.

Upon the rejection of the Vortex type 10 finish, Dunbar negotiated with the Gates Engineering Company as a manufacturer of type 10. In the meantime, the GSA wrote a letter of July 30th, in which it stated, "The William Dunbar Company, Inc., is approved as applicator for special coatings, types 7, 8, 9, 10, 11, 12 and 13 *provided that another manufacturer of types 10, 11, 12 and 13, whose materials will meet all contract requirements, is submitted for approval of the contracting officer.*" (emphasis added) Thus, at this time, Dunbar had met the test of being approved by GSA as an applicator, provided it submitted materials which could be approved by a manufacturer who would also approve Dunbar.

When Gates was brought into the picture, it analyzed the problem and wrote a long letter embodying instructions for use in connection with its proposed type 10 elastomeric decontaminable coating, in which it criticized the specifications as written, and suggested an alternative method of applying the coating. The Gates representative also stated, "Recent inspection revealed the concrete surfaces generally are not in a condition where they can satisfactorily receive a smooth, continuous, pinhole-free elastomeric coating. Some areas are 'honeycombed' some areas are scratched and gorged, while other areas will definitely require major repairs." Gates therefore suggested "that the only practical solution is to apply a material which will be compatible to the coating system, over the entire concrete area, thus effectively repairing all the various types of surface defects at one time and in one repair system."

In the meantime, however, it appears that Dunbar had made a test sample of the Gates's type 10 on the concrete walls, which was, on November 20, accepted and approved.

Thus affairs stood when, on November 13th, with neither the type 10, the elastomeric decontaminable type, nor types 11, 12, and 13 materials approved, Blount wrote what may well be considered to be an ultimatum to Dunbar, calling for immediate action with respect to a number of the requirements of the subcontract. As the failure to perform these requested acts constitute the alleged violation of the terms of the subcontract, we shall have to reproduce them fairly fully. This can most conveniently be done in a footnote.[2] It will be noted that these demands made by

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[2] The letter, addressed to William Dunbar Company, Inc., and dated November 12th, is as follows:

"On August 2, 1963, we sent you a subcontract covering painting and finishing work for the above referenced facility. As of this date, you have failed to submit samples and data acceptable to GSA for Types 11, 12 and 13 coatings and have otherwise failed to prosecute the work in accordance with the requirements of Subcontract Number 7552-27. This has caused delays in the progress of the work.

"It is, therefore, necessary for us to require you to adhere strictly to the following schedule:

(1) Submit, not later than November 23, 1964, the following samples and data for approval by GSA covering special coatings Type 11, 12 and 13.

(a) A general description of the coating system being proposed, and general specifications covering materials and methods of application.

(b) Experience record of the applicator in applying the proposed coating system. The applicator's experience record shall include a minimum of one year's experience in applying the type of coating proposed.

(c) A certified statement by the manufacturer of the coating material stating that the experience record of the applicator is acceptable to the manufacturer. The statement shall include the name and address of the manufacturer.

(d) Certified test data describing the material properties of the components of the proposed coating system as determined by an independent testing laboratory. Data shall cover at least the properties required for chemical resistance and decontaminability.

(e) Two sample coupons for each type of surface to be coated

(metal, concrete and concrete masonry units). These samples shall be approximately 6 inches by 6 inches, applied to the same type of surface as those to be coated in the work (metal samples for metal surfaces, concrete or concrete masonry unit samples or asbestos-cement board for concrete or concrete masonry unit surfaces). These samples will be used to evaluate the decontaminability of the proposed system.

(f) Wet samples, one quart each, of the components of the proposed coating system, including thinners and any required activators.

(2) Prepare sample areas as required by specification Paragraph 43-21-c not later than November 23, 1964.

(3) Submit detailed progress and manhour completion schedules for all remaining work in the job not later than November 23, 1964.

(4) Submit a complete list of materials that go into the job and, also, a complete list of the principal vendors and subcontractors' to whom orders have been given not later than November 23, 1964. This list to contain the name, address, purchase order number, items included and delivery dates. Copies of all purchase orders and subcontracts are to be furnished to us as soon as made.

(5) Submit a complete up-to-date procurement schedule, on forms acceptable to us, each month as part of payment application, or when no payment application is made, at the end of the month.

(6) Submit, not later than November 19, 1964, a detailed safety procedure which should contain a procedure for removing dangerous fumes and gases from the various areas during progress of the work. This should include information on the type equipment you will use, etc. and should be approved by your insurance carrier. The safety equipment must be on the job and in operating condition prior to commencement of any coating applications.

(7) Begin, on November 23, 1964, preparation of surfaces which are to receive Types 10, 11, 12 and 13 coatings and upon completion of sufficient areas, to proceed promptly with the application of the coatings in accordance with specification requirements. Unless we advise you otherwise in writing, the sequence and timing of your work must be:

(a) Reactor area basement and mezzanine surfaces as required by contract plans and specifications—start acid etching and surface preparation November 23, 1964 and complete application of all coatings not later than December 4, 1964.

Blount on the subcontractor fall in seven categories, as follows: (1) The requirement that there be a submission of the materials needed of the types 11, 12 and 13, as to which Dunbar had failed to submit a satisfactory type. As to these, the record is clear that Dunbar knew suppliers of these types but that it elected not to submit them because they were competitors in the sense that they were applicators as well as manufacturers, and Dunbar considered them his competitors. Instead, on November 23rd, Dunbar submitted to Blount a resubmission, once more, of the Vortex materials which had previously been rejected. There is some dispute as to whether Dunbar also submitted the supporting data listed in the footnote under subheadings (a) through (f). However, we think this unimportant in that the resubmission of Vortex was not in any measure in compliance with the requirement to submit types 11, 12 and 13 for approval. (2) The preparation of

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(b) Reactor area second floor surfaces as required by contract plans and specifications—start acid etching and surface preparation November 26, 1964 and complete application of all coatings not later than December 18, 1964.

(c) Reactor area first floor surfaces as required by contract plans and specifications—start acid etching and surface preparation November 30, 1964 and complete application of all coatings not later than December 24, 1964.

(d) Schedule for other areas will be furnished to you by our project superintendent.

"The above submittals should be sent to our office at the job site and should be properly marked and identified as required by the contract specifications.

"You are hereby notified that your failure (without our written consent) to comply strictly with the above listed requirements and other requirements of our subcontract with you will definitely result in termination of the subcontract in accordance with Article XIII thereof. This action will be absolutely necessary to avoid experiencing additional delays. As we have already pointed out, various delays have been experienced to date, and we intend to hold you liable for any direct or indirect expenses, further delays, or damages which have resulted, or may result from these delays."

sample areas for approval by the GSA. This was to be done not later than November 23rd. The sample area for type 10 was actually approved on November 20th. This left types 11, 12 and 13, which Dunbar said it could not complete because it had not yet found the supplier for these types, a matter wholly within its control and as to which it had made no progress by November 23rd, as mentioned under (1) above. (3) A detailed progress and man-hour completion schedule, to be submitted not later than November 23rd. This was not attempted by Dunbar. Dunbar's president explained on the trial that he did not do this because he had not received from the general contractor any schedule of the completion of its part of the contract or the work of other subcontractors. (4) The submission of a complete list of materials to go into the job together with a list of the vendors and subcontractors not later than November 23rd. This was not done, and Dunbar claimed that it was unable to do it because it did not yet know who would be the suppliers and therefore did not know what materials would go in to the job. This is subject to the same criticism as (1) and (2) above, in that Dunbar had ample time to submit the names of acceptable suppliers, but had failed to do so, but chose instead to submit for the second or third time the Vortex line, as to which Dunbar was a franchise distributor. (5) The submission of a complete, up-to-date procurement schedule. Dunbar did not do this, claiming it couldn't do it because it didn't know whom it was to procure the materials from. See (4) above. (6) The submission, not later than November 19th, of a detailed safety procedure. This involved listing the manner in which the particular safety precautions would be taken on account of the inflammable and volatile nature of the materials to be applied. This was not done and, in fact, after the purported termination, Dunbar had a crew of men applying the type 10 coverings without having complied with the safety requirements as provided for in the Gates Company's in-

structions touching this matter. (7) The beginning, on November 23rd, of preparations of surfaces which are to receive types 10, 11, 12 and 13 coatings, and, upon completion of sufficient areas to proceed promptly with the application of the coatings according to a time schedule as to the different areas involved. These required completion of the several areas on December 4th, December 18th, and December 24th, respectively. None of this, of course, was done because the termination date occurred on the 23rd, although on the 25th Dunbar had on the site some 30 or 35 gallons of type 10 coatings which his foreman was proceeding to apply to the concrete walls of the reactor area.

Relations between the parties severely deteriorated following the submission by Dunbar of the Gates suggestion that an alternative method be used to apply the type 10 coverings. However, the appellee does not seriously contest the legal right of Blount to insist upon prompt compliance with the requirements of the subcontract that had not by November 12th been carried out. Dunbar's defense is, rather, that its compliance was excused either because the surfaces were not ready for its work, or that final compliance was required in too short a time.

There can be no serious dispute between the parties as to the standard by which an appellate court must review the refusal of a trial court to grant a motion for a judgment notwithstanding a verdict by a trial jury, or the denial by a trial court of a motion for new trial. The basic guarantees of the Seventh Amendment to the Constitution of the United States are that "the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." It goes without saying that under this constitutional prohibition, neither the trial courts not appellate courts in the federal system are permitted to reweigh the evidence. In what the appellee calls "probably the best statement of the applicable rule," the United States Supreme Court, in

Lavender v. *Kurn*, has said where "There is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. 327 U.S. 645, 653." Correlatively, if there is not evidentiary basis for the jury's verdict, then the verdict can not be permitted to stand. See *Galloway* v. *United States*, 319 U.S. 732. In the case of *Lake County* v. *Massachusetts Bonding Ins. Co.*, 5 Cir., 75 F. 2d 6, this court said: "We have undertaken in many cases, as other courts have, to make it clear that a district judge may not direct a verdict against a party because he does not credit his evidence, and would, on that account, be disposed to set aside the verdict in his favor. He may only direct a verdict against a party when he can say that, viewing [the evidence] in a light most favorable to that party, fair minded men cannot honestly and reasonably draw a conclusion from it in his favor, [citing cases]." 75 F. 2d 6, 8.

This general language does not help us because of course, the question in every case in whether there is any evidence which, together with all of the permissible inferences to be drawn from it, permits a finding by the jury as to the precise issues which it is the duty of court and jury to resolve.

Here, the appellant overstresses its argument that there were judicial admissions by appellee's counsel during the trial that there had been several *breaches* in the contract; further, that James Dunbar, president of the Dunbar Company, in his oral testimony, also admitted such breaches. The trouble with this argument is that no such admission by counsel or testimony by the witnesses was given in precisely that manner. The argument of counsel and the testimony of Mr. Dunbar was in effect an admission that certain things that were called for by the contract had not been done, but they attempted to excuse the failure of performance in what at common law pleading used to be called confession and avoidance. Thus, it becomes neces-

sary for the court to examine the excuses given for the failure to carry out the exact terms of the contract. If, upon application of the proper legal principles, there was evidence which would have amounted to a defense against performing the requirements, this court could not review the jury's resolution of such factual issues. On the other hand, if there were substantial failures to perform, as was admitted, and there were no facts presented to the jury which, under the law, would excuse performance, then the jury verdict should have been set aside on the motion, and the judgment should be reversed by us.

We conclude from a careful reading of the record, that as to several of the failures of the Dunbar Company, there were no issues of fact, which, if resolved in favor of Dunbar, would excuse such failure. We conclude, therefore, that as to the issue of breach of the contract, the verdict should have been directed by the trial court.

Appellee defends largely upon the concept that its bonded contractor had undertaken a very difficult subcontract which it was attempting, to the best of its ability, to carry out at the time of termination. A second defense is that at the time of termination others were at fault for the failure of Dunbar and Company to satisfy the requirements imposed on it by the subcontract.

With respect to the first defense, appellee's brief says:

> "The fact is, and the record shows, it was Dunbar's contention throughout the proceeding (and the argument of counsel for appellee) that he did everything possible to obtain approval, exercised due diligence in doing so, and that the fault, and the force of the difficulty encountered in securing the approval of certain coatings, *lay in the specifications designed by the government.* This is what the record shows, and this is what the comment of counsel say." (Emphasis added.)

It is difficult to see how the fact that Dunbar's difficulty arose from the specifications designed by the government could be any defense to Dunbar's failure. These were the specifications which the subcontractor agreed to be bound by. Moreover, the record is absolutely without dispute that it would have been extremely simple for Dunbar to have obtained approval of types 11, 12 and 13, if this subcontractor had been willing to approach sources of supply, the names of whom were furnished to Dunbar by Blount early in the period of the contract. Instead of this, Dunbar, entirely possibly because it had an interest in selling Vortex paint and coverings, twice re-submitted this product after it had been rejected by the General Services Administration.

As to type 10, the most sophisticated type of covering involved, the record shows that after the ultimatum letter was written, Dunbar received approval of its sample of type 10 covering; it had by that time obtained approval as an applicator of this type 10 covering, and this further demonstrated, without dispute, that the surfaces provided for the making of the sample were fully adequate and appropriate. Thus there is absolutely no proof in the record to show why Dunbar could not have proceeded with the application of type 10, commencing on November 23rd, as required by the Blount communication of November 13th, unless it be the condition of the surfaces on which type 10 coverings were to be applied, a matter which we will later deal with.

The absolute failure of Dunbar to furnish any of the schedules or any of the lists of materials and names of suppliers of types 10, 11, 12 and 13, "before November 23rd," as required in Blount's letter, cannot be excused by any testimony given on the trial, for, as above indicated, there was no proof that there was any bar to Dunbar's ascertainment of the names and qualifications of the suppliers of these types of coverings prior to that date.

Next, with respect to appellee's contention that performance of these provisions of the contract was excused by the generalized statements of some of the witnesses at the trial that parts of the walls were damp on November 13th, and some parts were still unsuitable on November 23rd, we conclude that this matter was taken out of the realm of a jury issue by reason of the actions of the subcontractor on November 25th. On that date, the foreman and several assistants showed up at the job site with some 30 to 35 gallons of wall coverings of the type 10 and started to apply it. They continued for some time in doing so, as a demonstration, so they said, of their ability to carry out the terms of the contract. This belies any effort to show that the condition of the surfaces at that time was such that Dunbar was prevented during the period mentioned in the November 13th letter, from carrying out this phase of its contract.

Moreover, the terms of the subcontract required that Dunbar and Company assume some of the responsibilities for "preparation of surfaces." Under the section of the general contract, denominated "Painting and Finishing," which is also the title of the subcontract under which Dunbar was operating, it was arguably the responsibility of Dunbar to correct the defects in the surfaces that, on the trial, its witnesses undertook to show existed at the time of the receipt of the November 13th letter. However, whichever party had this responsibility, the issue did not remain in the case because of the fact that within the period specified under the contract, Dunbar started the work on type 10 covering, which is the only type of surface whose imperfect condition it contended would in any way delay its full performance of the requirements as laid down by Blount.

Moreover, as has been indicated above, even if there had been delays in the actual performance of the application of the coverings by reason of defects in the surfaces,

this had no bearing upon the failure by Dunbar to comply with the other requirements as to scheduling of the work so far as such schedules could remain within its own control, obtaining the government's approval of the remaining types of coverings and the submission of detailed statements concerning the names of suppliers and the names of the products to be used. In light of Blount's difficulty in having the type 10 coverings approved, and in light of the repeated submissions of the disapproved product by Voltex, Blount's concern some five months before it was required to complete construction that this information be furnished was not only reasonable, it was essential to prevent it from being subject to a termination of the contract by the principal, the General Services Administration.

In sum, the record discloses no dispute about the following facts: Some 13 or 14 months after the subcontract had been entered into, and within five months of the date of termination, Dunbar had completely failed to submit and obtain approval of three out of the four most unusual types of coverings that had to be used to complete the job; Dunbar had not prepared sample areas for approval as to types 11, 12 and 13; Dunbar had failed to submit a detailed progress and man-hour completion schedule because of its failure to obtain from the general contractor any schedule of the completion of its part of the contract; Dunbar had failed to submit a complete list of materials to go into the job, together with a list of the vendors or subcontractors because of its failure to obtain approval of the materials and thus of the suppliers; Dunbar had failed to submit an up-to-date procurement schedule which, of course, it said it could not do because it did not even know yet what materials it was to procure; there had been a complete failure by Dunbar to submit a safety procedure.

None of these failures could be excused by the fact that there were defects in the surfaces on which Dunbar was

to apply the type 10 covering, because whatever defects there were were either unimportant[3] or had been overcome by the method of application. There is nothing in the record that indicates any reason why it would be impossible for Dunbar to complete the schedule of application of type 10 within the time specified in the November 13th letter. If, however, defects in the surfaces were apparent during this period of time, the general terms of the contract provided means by which this dispute could be resolved. Certainly their prior existence and the possibility of there still being some surface defects, even if none of this fell to the lot of the subcontractor to repair them, did not justify the failure of the subcontractor to carry out the remaining terms of the contract dealing with the types 11, 12 and 13 coverings, all of which were no further advanced than they had been the day the contract was signed, other than the fact that the government had expressly ruled out the only proposed materials submitted by Dunbar.

We find no evidence to warrant submission of the excuses for non-performance to the jury, because none of this evidence was sufficient as a defense to the requirements of the general terms of the contract and the specific terms of the subcontract.

We conclude that the judgment of the trial court refusing the motion for judgment non obstante verdicto must be reversed and the case remanded for determination of the amount of damages resulting from the breaches of the

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[3] It appears that Dunbar furnished two sample coatings at places designated for this type 10 covering; the first was applied by rollers and it appeared defective, whereupon Dunbar prepared a second test area by a hot-spray method, and this was fully approved by the General Services Administration, and thus such defects as had existed seem to have been fully overcome prior to Novembr 23rd.

subcontract for which the appellee bonding company made itself liable.

The judgment is REVERSED.

APPENDIX "B"

Amendment Seven to Constitution of the United States

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any

judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1198

RELIANCE INSURANCE COMPANY, *Petitioner,*

v.

BLOUNT BROTHERS CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

CASES:

Magnum Import Co. v. *Francois Joseph de Spoturno Coty* (1923), 262 U.S. 159 5

STATUTES:

Rule 50, Federal Rules of Civil Procedure 2, 4

Rule 19(1)(b), Supreme Court Rules 2, 5

MISCELLANEOUS:

5 Moore's Federal Practice, 2d. Ed. § 50.02[1] 4

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (App. A of Petition) is reported at 370 F.2d 733.

STATUTE INVOLVED

Rule 19(1)(b) of the Rules of this Court, setting forth considerations governing review on certiorari from a court of appeals, is set forth in the Appendix hereto. Rule 50 of the Federal Rules of Civil Procedure, in pertinent part, is set forth in Appendix B to the Petition.

QUESTION PRESENTED

Where a construction subcontractor admittedly had failed to perform in several respects its written contract with the respondent prime contractor, may a court of appeals review the record to determine whether there was any evidence to excuse such non-performance, and, finding no such evidence, reverse a judgment in favor of the subcontractor's surety company?

STATEMENT

Petitioner has omitted mention of one important fact in its statement of the case: At the trial it was admitted that petitioner's principal, the William Dunbar Company, Inc. ("Dunbar"), had failed to perform certain essential obligations of its contract with respondent. The record so shows (R. 472, 473, 673, 782, 789, 801, 838), and the Court of Appeals below so found. (370 F.2d at 740, Petition, pp. 13a, 14a)

ARGUMENT

This case, as every other case, is certainly important to the parties, but it is, after all, merely another run-of-the-mine contract case between two commercial enterprises, an insurance company and a general contractor. The sole issue is whether there was any evidence to excuse the admitted failure of a subcontractor

(petitioner's principal) to perform its contract with the respondent general contractor. There is nothing presented which would warrant review by this Court on certiorari; there is no public interest in the case, no conflict in circuits, no federal question decided in conflict with applicable decisions of this Court, nor any departure from the accepted and usual course of judicial proceedings.

I.

Petitioner declares that the Court below found that there were no admissions that Dunbar, petitioner's principal, had failed to perform its contract with respondent. (Petition, pp. 5, 6). In this respect petitioner erroneously represents the state of the record. The Court below found directly to the contrary: it *specifically* held that petitioner's counsel and Dunbar's president had admitted that Dunbar failed to perform in accordance with the contract:

> *"The argument of counsel and the testimony of Mr. Dunbar was in effect an admission that certain things that were called for by the contract had not been done, but they attempted to excuse the failure of performance* in what at common law pleading used to be called confession and avoidance. Thus it becomes necessary for the Court to examine the excuses given for the failure to carry out the exact terms of the contract." (370 F.2d at 740, Petition, p. 13a) (Emphasis added).

II.

Petitioner contends that it was error for the Court below to read the record:

> "The basic error of the lower Court lies in the fact that it . . . felt free to study the entire record . . . ." (Petition, p. 5)

Thereupon, petitioner contends, the Court below fell into further error when it allegedly weighed the evidence and substituted its factual opinions for that of the jury.

On appeal from a judgment denying a motion for a judgment *non obstante veredicto* a court of appeals is under a duty to review the record to determine whether there is any evidence to support the verdict. 5 Moore's Federal Practice, 2d Ed. § 50.02[1] If the Court finds any evidentionary support, it must affirm; on the other hand, if it finds none, it must reverse, or else there is no substance to Rule 50 of the Federal Rules of Civil Procedure, and motions for a directed verdict and for judgment notwithstanding the verdict are meaningless gestures.

The opinion of the Court below clearly reveals that it is understood and acted in accordance with both the limitations and the duties placed upon it. It did not weigh the evidence, nor did it substitute its factual findings for those of the jury. It reviewed the record in the light of the several admitted failures of performance, and, *as to some of those failures,* found there were *no* facts presented to the jury which would excuse the failures. Therefore, it had to reverse. The Court said, at 370 F.2d 740 (Petition, p. 14a):

> "If, upon application of the proper legal principles, there was evidence which would have amounted to a defense against performing the requirements, this court could not review the jury's resolution of such factual issues. On the other hand, if there were substantial failures to perform, as was admitted, and there were no facts presented to the jury which, under the law, would excuse performance, then the jury verdict should

have been set aside on the motion, and the judgment should be reversed by us.

"We conclude from a careful reading of the record, that *as to several of the failures of the Dunbar Company, there were no issues of fact, which, if resolved in favor of Dunbar would excuse such failure.* We conclude, therefore, that as to the issue of breach of the contract the verdict should have been directed by the trial court." (Emphasis added)

III.

Petitioner received a full and fair hearing in the Court below. Dissatisfied with the result, petitioner seeks another hearing in this Court. However, as stated by Chief Justice Taft in *Magnum Import Co.* v. *Francois Joseph de Spoturno Coty* (1923), 262 U.S. 159, at 163:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals . . . was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The Court of Appeals below was required to hear this case; this Court is not required to do so and should not. Rule 19(1)(b), Supreme Court Rules.

The petition for writ of certiorari should be denied because:

(1) There is no showing of a question of sufficient public importance to justify review by this Court.

(2) This case does not fall within the guide lines for granting certiorari set out in this Court's Rule 19(1)(b).

(3) The decision of the Court of Appeals is correct; there is no evidence in the record which would support the judgment of the trial court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 25, 1967

APPENDIX

Supreme Court Rule 19(1)(b) provides:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."